BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SANDRA E. GIBSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 186,100
STATE OF KANSAS	)	
Respondent	)	
AND	)	
	)	
STATE SELF INSURANCE FUND	)	
Insurance Carrier	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Respondent appeals from an Award entered by Special Administrative Law Judge William F. Morrissey on June 21, 1995. The Appeals Board heard oral argument October 26, 1995.

APPEARANCES

Claimant, Sandra E. Gibson, appeared by and through her attorney, Steven L. Foulston of Wichita, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, Kendall R. Cunningham of Wichita, Kansas. The Workers Compensation Fund was represented by its attorney, Cortland Q. Clotfelter of Wichita, Kansas.

RECORD & STIPULATIONS

The Appeals Board has considered the record identified in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

ISSUES

The issues on which the parties request review on appeal are:

(1) Whether claimant suffered personal injury by accident arising out of and in the course of her employment with respondent by her daily work from February 2, 1989 through December 18, 1993.

(2) Claimant's average weekly wage.

(3) The nature and extent of claimant's disability.

(4) Whether the Kansas Workers Compensation Fund should be responsible for all or a portion of the cost of this claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties the Appeals Board finds as follows:

(1) Claimant sustained accidental injury arising out of and in the course of her employment on February 2, 1989.

Claimant alleged an initial injury on February 2, 1989 when she fell from a chair on which she was standing, followed by continuing permanent aggravation through December 18, 1993. Respondent stipulated to the injury of February 2, 1989 but disputed the claim for additional permanent aggravation. The Special Administrative Law Judge (ALJ) found, from his review of the record, claimant sustained no additional permanent aggravation from work activities after the initial injury of February 2, 1989. None of the parties dispute that finding on appeal. Claimant, respondent, and the Fund expressly limit their challenge to other findings. While the Appeals Board notes the record contains evidence which might support a finding of additional permanent aggravation after the initial injury, namely the testimony of claimant and testimony of Dr. Ernest Schlachter, the Board will not review or reconsider this unchallenged finding by the ALJ.

(2) The Appeals Board also agrees with the finding by the Special Administrative Law Judge relating to claimant's average weekly wage. As the Special Administrative Law Judge found, claimant was not considered a full-time hourly employee. She was, therefore, not entitled to use a minimum of 40 hours per week and, instead, the average weekly wage is based upon the actual earnings. This would normally be based upon the 26 weeks preceding the date of accident. However, in this case, claimant was not working due to the carpal tunnel surgery prior to the injury. The Special Administrative Law Judge, therefore, used a calculation based upon the one-month earnings converted to a weekly earning for the only month shown in the record. This yields a base wage of $208.93. To this wage, the Special Administrative Law Judge added fringe benefits in the amount of $134.16 for weeks after December 18, 1993. The Appeals Board agrees with and adopts these findings.

(3) For the February 2, 1989 injury, claimant is awarded benefits based on a nine percent functional impairment through December 18, 1993 and a 34 percent work disability thereafter.

Claimant worked for SRS taking care of elderly and handicapped individuals in their homes. She gave them baths, dressed them, cleaned their houses, did their laundry and ran their errands. As indicated, she was injured on February 2, 1989 when the chair on which she was standing slipped from beneath her. She grabbed a partition to stop her fall but sustained injuries which resulted in initial complaints to her neck, both her shoulders and her mid back.

Claimant had undergone carpal tunnel surgery release by Dr. Artz and had been released to return to work less than a month before the February 2 injury. During an examination by Dr. Artz in October 1989, apparently related to the carpal tunnel condition, claimant complained of problems in her neck and shoulder from the February 2, 1989 fall. Dr. Artz, thereafter, provided treatment for the injury involved here, including cervical traction, pain medication and pain blocks. Dr. Artz also referred claimant to Dr. Wolf who confirmed a diagnosis of fibromyalgia. Claimant continued to work for respondent during the course of this treatment and as of August 18, 1991 Dr. Artz concluded claimant had reached maximum medical improvement. Dr. Artz rated her impairment as 3 percent of the body as a whole for neck, upper back and shoulder discomfort. On the basis of a functional capacity exam he recommended she limit her work to lifting less than 27 pounds frequently, and lifting overhead to 10 pounds frequently and 15 pounds infrequently.

After the release by Dr. Artz, claimant continued in her regular duties for respondent without accommodation and at a comparable wage. Her shoulder complaints continued, however, and in March 1993 respondent referred her for evaluation by Dr. Eyster. Dr. Eyster rated claimant's impairment at 6 percent of the whole body and recommended restrictions against excessive pushing, pulling or lifting in excess of 20 pounds on a repetitive basis and no overhead work. He also recommended and performed surgery, an acromioplasty, to her right shoulder. He released her to return to work in June 1993. Claimant returned to her regular work without accommodations but left this employment in December 1993 when she quit because the pain had become too bad to continue. At his deposition Dr. Eyster testified that his restrictions after the surgery would have been essentially the same as those he recommended in March 1993 before he performed the surgery.

Three physicians testified to the functional impairment resulting from claimant's injuries. In addition to Dr. Artz's rating of 3 percent and Dr. Eyster's rating of 6 percent to the body as a whole, Dr. Schlachter rated the impairment at 19 percent to the body as a whole. Giving equal weight to these 3 impairment ratings, the Appeals Board finds claimant sustained a 9 percent functional impairment as a result of the injury. The award will be based upon that 9 percent functional impairment for the period claimant continued to work at a comparable wage, that is from February 2, 1989 through December 18, 1993. Claimant's testimony that she left work December 18, 1993 because of her injuries is undisputed. The presumption found in K.S.A. 44-510e, therefore, no longer applies after that date and claimant would be entitled to work disability.

The Special Administrative Law Judge determined the extent of the work disability by giving equal weight to the two vocational experts who testified in this case, Mr. Jerry Hardin and Ms. Karen Terrill. Respondent challenges this finding and asserts that the opinions of Mr. Jerry Hardin should not be given equal weight. Respondent argues that Mr. Hardin's opinions consider restrictions for bilateral carpal tunnel syndrome not related to the injuries in this case and assumed that claimant's restrictions were bilateral when, in fact, they were to the right arm only. In his deposition Mr. Hardin is questioned about those

assumptions. He agrees that his opinions would be modified somewhat by those factors, but insists that those modifications would be relatively minimal. The Claimant was right-hand dominant so, in his opinion, the fact the restrictions were to the right only, made little difference. Based upon Mr. Hardin's testimony, the Appeals Board concludes that these factors did not justify discounting Mr. Hardin's opinion any more than is done by giving equal weight with the opinions of Ms. Terrill.

Respondent also argues that Mr. Hardin's opinions, at least those relied upon by the Special Administrative Law Judge, failed to take into consideration preexisting restrictions. There are at least two sets of restrictions that might be considered. Claimant underwent surgery to her right wrist in August of 1986. Dr. Artz imposed restrictions at that time limiting claimant to lifting 20 to 30 pounds. Claimant has testified, however, that those were temporary restrictions. She has also testified that the work for respondent required lifting 30 to 40 pounds and no accommodation was made to the restrictions from Dr. Artz in 1987. An additional set of restrictions were imposed following the carpal tunnel surgery in 1988. Claimant and Dr. Artz testified that those were, again, temporary restrictions intended to be lifted in approximately three months. Under these circumstances it appears appropriate to give weight to opinions which did not consider those restrictions.

Ms. Terrill has testified that she considered claimant's pre-injury labor market to be limited to the medium category of work. This was her opinion based upon review of the medical records and claimant's work history. Her opinions were not tied to any specific set of pre-injury restrictions. She concluded, from her review of prior medical records, that claimant could not, pre-injury, have been able to perform heavy and very heavy categories of work. Even though the only prior restrictions were temporary, the Appeals Board also considers it appropriate in this case to give weight to the opinion of Ms. Terrill. Giving approximately equal weight to both opinions, the Appeals Board agrees with the conclusion by the Special Administrative Law Judge that claimant suffers a 48 percent loss in her ability to perform work in the open labor market.

The Appeals Board also agrees with the decision to give approximately equal weight to the opinions of both experts regarding loss of ability to earn a comparable wage. This issue is complicated by the fact that claimant is operating a child care facility. Claimant insists the record shows she is not earning any income and suggests the wage loss should be considered to be 100 percent. Respondent, on the other hand, urges the Appeals Board to use total gross revenues received by the claimant in the course of her business. Both experts, however, gave opinions based upon the ability to earn wages in other employment. Given the fact claimant's business is only now beginning to get going, the Appeals Board finds it more appropriate to rely upon those projections of ability rather than rely on the earnings from the current business. When using loss of ability Mr. Hardin concludes claimant has a 40 percent loss and Ms. Terrill concludes claimant should be able to earn comparable wages. Giving equal weight to both opinions, the Appeals Board agrees with the conclusion of the Special Administrative Law Judge that claimant has a loss of 20 percent of her ability to earn comparable wages.

By giving equal weight to the 48 percent loss of ability to perform work in the open labor market and the 20 percent loss of ability to earn comparable wages, the Appeals Board finds claimant has a 34 percent permanent partial general body work disability after December 18, 1993.

(4) The Appeals Board agrees with and affirms the conclusion that the Workers Compensation Fund is not liable for any portion of the Award. The argument for Fund liability was based on the claimant's contention that her February 2, 1989 injury was permanently aggravated by subsequent work activity. Having found there was only one accident, there is no Fund liability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated June 21, 1995 is modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Sandra E. Gibson, and against the respondent, State of Kansas, and the State Self Insurance Fund, for an accidental injury which occurred February 2, 1989, and based upon an average weekly wage of $208.93, for 10.71 weeks of temporary total disability compensation at the rate of $139.29 per week or $1,491.80, followed by 243.58 weeks at the rate of $12.54 per week for a 9% general body disability based on an average wage of $208.93 per week or $3,054.49, followed by 160.71 weeks at $54.38 per week for a 34% permanent partial general body disability based on a wage of $239.89 per week or $8,739.41, making a total award of $13,285.70.

As of April 30, 1996, there is due and owing claimant 10.71 weeks of temporary total disability compensation at the rate of $139.29 per week or $1,491.80, followed by 243.58 weeks of permanent partial disability compensation at the rate of $12.54 per week in the sum of $3,054.49, and 123.42 weeks at $54.38 per week or $6,711.58 for a total of $11,257.87 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $2,027.83 is to be paid for 37.29 weeks at the rate of $54.38 per week, until fully paid or further order of the Director.

Future medical benefits will be awarded only upon proper application to and approval of the Director. Unauthorized medical expense of up to $350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

All compensation, medical expense and administrative costs are to be borne by the respondent and not by the Kansas Workers Compensation Fund.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expense of administration of the Kansas Workers Compensation Act are hereby assessed to the respondent and to be paid directly as follows:

William F. Morrissey Special Administrative Law Judge	$150.00
Barber & Associates Transcript of Regular Hearing	$295.00

Deposition Services

Deposition of Ernest R. Schlachter, M.D.	$342.40
Deposition of Sandra E. Gibson	$335.00
Deposition of Jerry D. Hardin	$408.00

Ireland Court Reporting

Deposition of Tyrone D. Artz, M.D.	$155.00
Deposition of Robert Eyster, M.D.	$135.00
Deposition of Karen Crist Terrill	$194.80

IT IS SO ORDERED.

Dated this ____ day of April 1996.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Steven L. Foulston, Wichita, KS
Kendall R. Cunningham, Wichita, KS
Cortland Q. Clotfelter, Wichita, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director